IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 853 OF 2007

IN

APPEAL (LODGING) NO. 129 OF 2007

IN

CHAMBER SUMMONS NO. 988 OF 2004

IN

S.C.SUIT NO. 2575 OF 1983

Jayant Achyut Sathe & Ors. ... Appellants

Versus

Plaintiffs Dr. Dara Burjor Joshi

(now deceased) ... Defendant

And

Smt. Margaret Darabsha/Dara Joshi

& Ors. ... Respondents

(Legal heirs & representatives of

deceaded defendant).

Mr. M.M.Sathaye for the Appelalnts

None for Respondents.

CORAM: D.K.DESHMUKH &

J.H.BHATIA,JJ.

DATE : 26th July, 2007.

P.C.

1. This Notice of Motion is taken out by the original plaintiffs for condonation of delay in filing the appeal against the order dated 17th November, 2006 passed by the learned Single Judge of this Court in Chamber Summons No.988 of 2004. That Chamber Summons was taken out by the present appellants for condonation of delay of 2610 days in applying for setting aside the abatement of the suit on account of the death of the original defendant, who expired on 31st January, 1997.

2. When the matter was called for hearing, we indicated to the learned Advocate appearing for the appellants that in order to be satisfied that sufficient cause is shown by the appellants for condonation of delay in filing the appeal, we would like to hear him on merits of the appeal to find out whether the appellants have prima facie case on merits because one of the factors to be considered in judging whether the appellants have shown sufficient cause for condonation of delay is whether they have good prima facie case. The learned Advocate stated before us that he is not willing to argue anything on merits of the appeal and that his application for condonation of delay in filing the appeal may be considered without any reference to the merits of his case.

3. Insofar as the affidavit filed in support of the

Motion taken out for condonation of delay is concerned, it seeks the exclusion of time from 17.11.2006 (the date on which the order was made) till 13.12.2006 on the ground that the certified copy was obtained during that period. For filing a Letters Patent Appeal, it is not necessary to obtain certified copy of the order. Then the second reason given for the delay is that the person who has field the affidavit in support of the Motion, who is a power of attorney holder of the plaintiffs was unwell. A medical certificate issued by Dr. Thole is produced. We have perused the Appeal Paper Book. We find that the sole defendant died on 31.1.1997. Admittedly, the appellants got knowledge of the death in December, 2000. The Chamber Summons was taken out on 30th June, 2004.It is clear from the order of the learned Single Judge that Special Civil Suit was instituted in the year 2002 in the Civil Court at Nashik seeking a declaration in relation to the validity of the agreement dated 30.12.1975 for the enforcement of which the present suit has been field. In the Written Statement filed in that suit by the appellant, a statement was made on behalf of the appellant herein that he has already taken out Chamber Summons for setting aside the abatement of this suit. That statement obviously was a false statement. The Chamber Summons was not instituted in the year 2002, but was instituted only on 30th June, 2004. The learned Single

Judge has referred to the Judgment of the Supreme Court in the case of Ram Nath Sao v. Gobardhan Sao, reported in (2002) 3 SCC 195 and has held that condoning delay in taking out application for setting aside the abatement would result in perpetrating injustice and would defeat the ends of justice. Therefore, the learned Single Judge declined to condone the delay.

4. Perusal of the Memo of Appeal and the papers filed on record do not show that there is any error in the order passed by the learned Single Judge. The appellants do not have any case on merits and, therefore, no useful purpose will be served by condoning the delay.

The Notice of Motion is, therefore, disposed of.

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(D.K.DESHMUKH,J.)

(J.H.BHATIA,J.)